

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Communications Services for)	WT Docket No. 11-40
Native Nations by Promoting Greater)	
Utilization of Spectrum over Tribal Lands)	

To: The Commission

COMMENTS OF VERIZON WIRELESS

Verizon Wireless submits these comments in response to the *Notice of Proposed Rulemaking* regarding ways to improve mobile wireless services to Native Nations.¹

Verizon Wireless supports the Commission’s goal in this proceeding of “promoting greater use of spectrum over Tribal lands.”² In particular, as discussed below, Verizon Wireless supports giving Tribal entities priority access to future releases of spectrum covering unserved Tribal lands, subject to certain limited conditions. Verizon Wireless also generally supports the proposals to establish a Tribal lands construction safe harbor and enhance the Tribal lands bidding credit. These proposals provide additional incentives for licensees to voluntarily decide to expand service in Tribal areas. The additional proposals to mandate good faith negotiations and require a licensee to build or divest spectrum, however, are premature, present numerous problems, and should be deferred for any further consideration until after the Commission’s other proposals are implemented and are proven to be insufficient to promote the goals of this proceeding.

¹ *Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands, Notice of Proposed Rulemaking*, 26 FCC Rcd 2623 (2011) (“*Notice*”).

² *Id.* at 2624 ¶ 1.

I. VERIZON WIRELESS GENERALLY SUPPORTS IMPLEMENTING A TRIBAL LICENSING PRIORITY, ESTABLISHING A TRIBAL SAFE HARBOR, AND ENHANCING THE TRIBAL LANDS BIDDING CREDIT.

Verizon Wireless supports the Commission’s proposals that provide additional incentives to voluntarily expand service in Tribal areas. Verizon Wireless strongly recommends that the Commission focus these proposals on meeting the needs of unserved Tribal lands, rather than underserved Tribal lands. Unserved areas will benefit most from the Commission’s proposed incentives and therefore should be the priority. In addition, the inclusion of underserved areas at this time will severely complicate implementation of these policies. Among the complex issues the Commission would need to resolve is how to determine what “underserved” means in terms of number of wireless providers, coverage, and/or generation of wireless technology. Even calculating “coverage” poses numerous complicated issues.

A. A Licensing Priority for Unserved Tribal Lands Can Promote Greater Use of Spectrum in Tribal Areas, Subject to Certain Limitations.

The *Notice* proposes to establish a “licensing priority” that would be available to Tribal entities for unserved or underserved Tribal lands within the area covered by an unassigned Wireless Radio Services license.³ This would appear to involve the creation of a special geographic license designation for future releases of spectrum, whereby Tribal entities would be given priority access to unserved or underserved Tribal areas within unassigned license areas prior to auction. Because only one Tribal applicant is expected per area, the Commission would avoid the need for auctions to resolve mutual exclusivity⁴ – presumably permitting the FCC to issue the license to the Tribal entity without payment. Verizon Wireless generally supports this

³ *Id.* at 2635 ¶ 35.

⁴ *See id.* at 2636 ¶ 38.

proposal as a way to promote greater spectrum use in Tribal areas, subject to the following caveats.

First, the license priority should be available only for areas of Tribal lands that are not already served by wireless coverage. Otherwise, by giving away a license for service that covers an area that already receives service, the FCC could undermine existing providers' ability to continue to serve areas in which they have already deployed. As the Commission has previously recognized, there are very rural areas that simply do not offer the economies of scale sufficient to support extensive new entry.⁵ Further, removing Tribal areas that already receive wireless service from an initial license could devalue the non-Tribal portions of the license to be auctioned.

Second, in order to ensure continuity of service between Tribal and non-Tribal areas, there must be definitive rules governing interference and service area boundary (extension) agreements between Tribal and auctioned license areas. Without such protections, the quality and availability of wireless service in areas surrounding the unserved Tribal lands could be compromised. Verizon Wireless therefore agrees that if a Tribal priority is awarded, the Tribal entity "would also have to ensure that its contemplated operations would meet all applicable service rule requirements, such as interference protection standards."⁶

⁵ See *Facilitating the Provision of Spectrum-Based Services to Rural Areas, Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 19078, 19115 n.203 (2004) ("The Commission [has] acknowledged ... that the underlying economics appear to make it unlikely that competition in RSAs will evolve in the near term to rival that in MSAs."); *Spectrum Aggregation Limits For Commercial Mobile Radio Services, Report and Order*, 16 FCC Rcd 22668, 22680 ¶ 28 (2001) ("In rural markets ... demographic and geographic conditions generally appear to render additional large-scale entry economically difficult to support.").

⁶ Notice, 26 FCC Rcd at 2637 ¶ 40 & n.78.

Third, once an application for a Tribal priority has been granted, the license must remain under the control of and for the benefit of the Tribal entity – and not be sold or bartered. It would undermine the purpose of the priority – to give spectrum to qualifying Tribal entities in order to facilitate the provision of service in unserved Tribal areas – if recipients of the licensing priority were permitted to transfer or assign the license to another entity for profit, especially prior to the buildout and the initiation of service in the Tribal areas.

B. A Properly Defined Tribal Lands Safe Harbor Will Promote Buildout in Tribal Areas.

Verizon Wireless supports the establishment of a Tribal lands construction safe harbor for licenses in the Wireless Radio Services, whereby “a licensee that provides a specified level of service to the Tribal land areas within the geographic area of its license would be deemed to have met its construction obligations for its entire service area.”⁷ If properly defined, a safe harbor can provide an added incentive for licensees to expand service in Tribal lands.⁸ The Commission should strive to avoid creating a safe harbor that permits a licensee to satisfy performance requirements for a large licensed area like an EA or REAG by serving only a small Tribal area or population. A construction multiplier that permits a licensee to multiply the population or geographic coverage it has deployed to Tribal lands by a set percentage, and to count the resulting number towards satisfaction of its construction requirements, would encourage Tribal area buildout while ensuring adequate construction in non-Tribal areas of a licensed geographic area.

⁷ *Id.* at 2643 ¶ 64.

⁸ *See id.*

C. Enhancing the Tribal Lands Bidding Credit Can Facilitate Service to Tribal Areas.

Verizon Wireless also supports modifying the rules applicable to the Tribal lands bidding credit, which is available to any winning bidder in a Commission auction that “commits to deploying facilities and providing wireless services to qualifying Tribal lands.”⁹ Modifying the rules to enhance the terms and benefits associated with the credit will create greater incentives for auction bidders to deploy service to Tribal lands.

II. ADDITIONAL PROPOSALS IMPOSING NEGOTIATIONS PROCEDURES AND BUILD-OR-DIVEST REQUIREMENTS SHOULD NOT BE ADOPTED AT THIS TIME.

The *Notice* also proposes the adoption of mandatory negotiations and build-or-divest rules. Specifically, the *Notice* proposes to “create a formal negotiation process that would enable a qualifying Tribal entity to require a licensee to enter into good faith negotiations regarding a secondary markets transaction with respect to any geographic portion of the licensee’s license area that is covered by unserved or underserved Tribal lands.”¹⁰ In addition, the *Notice* seeks comment on whether to permit Tribal entities to “require a licensee to build or divest a geographic area covering unserved or underserved Tribal lands within its license area.”¹¹

The adoption of these requirements at this time is not warranted and would in any event be premature. As discussed above, the Commission should focus on creating incentives for Tribal entities to acquire new licenses, and for all licensees to build out unserved Tribal lands. Only after these incentives have been tested should the Commission consider more extreme measures. Indeed, the combination of the incentives discussed above with the Commission’s

⁹ *Id.* at 2643-44 ¶ 68.

¹⁰ *Id.* at 2639 ¶ 47.

¹¹ *Id.* at 2640 ¶ 53.

plan to make significant amounts of spectrum available for wireless broadband in the next five years¹² should ensure that wireless service is further extended to Tribal lands, and will enable Tribal entities using the “licensing priority” to obtain precisely what they are seeking – access to significant amounts of spectrum.

If the Commission later determines (for example through a Further Notice) based on the record that a “mandatory negotiations” rule is necessary, it should tailor it to address the following concerns. First, only areas that are unserved should be subject to the formal negotiation process.¹³ Licensees should not be compelled to enter into negotiations to sell or lease Tribal areas that they have built out and are serving consistent with the terms of their licenses.

Second, negotiations should be compelled only after the licensee has met its applicable construction requirement(s), provided that the Tribal entity can show that the licensee previously failed to negotiate in good faith.¹⁴ The proposal that negotiations could be compelled “at any time during the license term”¹⁵ could wreak havoc with a licensee’s build plan, forcing it to diverge from a planning strategy that is otherwise fully consistent with the Commission’s construction requirements. Such an approach could direct build resources to more sparsely populated Tribal areas at the expense of more populated areas.

Third, any definition of “good faith” should be based on clear, objective standards applied equally to both parties, as applicable, akin to those set forth in Paragraph 48 of the

¹² Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 84-93 (rel. Mar. 16, 2010).

¹³ *See Notice*, 26 FCC Rcd at 2634 ¶ 28.

¹⁴ *Id.* at 2639 ¶ 47.

¹⁵ *Id.*

Notice.¹⁶ The Commission should not rely on a subjective standard, such as the ambiguous “totality of the circumstances,” which could force the Commission to adjudicate disputes that should be resolved by the parties, including what is or is not fair market value for spectrum. The Commission should also clarify that, as with any negotiation, the parties retain the ability to walk away if an agreement cannot be reached, as long as the objective good faith standards have been satisfied.¹⁷ In other words, the absence of an agreement should not indicate bad faith.

Finally, any mandatory negotiations requirement should not take effect for at least three years after it is adopted. This transition period would give licensees the chance to engage in informal negotiations to sell or lease spectrum before a formal process takes effect that could constrain, rather than facilitate, secondary market dealings.

Similarly, while it is premature to consider at this time a “build-or-divest” requirement, if at a later date the Commission considers it, the Commission will need to address the following issues. First, consistent with the *Notice*, any build-or-divest proposal must afford the licensee the *choice* to build if it chooses not to divest.

Second, the divestiture option should apply only to areas that are truly unserved and not to “underserved” areas as proposed.¹⁸ As discussed above, licensees should not be compelled to

¹⁶ These standards include: no refusal to negotiate; appointment of a negotiating representative; reasonable meeting times/locations; no “take it or leave it” bargaining; Tribal provision of reasons for rejecting a licensee’s offer; and execution of a written agreement “if an agreement is reached.” *Id.* at 2639-40 ¶ 48.

¹⁷ The *Notice* appears to contemplate that not all negotiations will result in an agreement, when it calls for execution of a written agreement as one of the objective good faith standards only “if an agreement is reached.” *Id.* at 2639 ¶ 48 (emphasis added). See also *North County Communications Corp. v. MetroPCS California, LLC*, *Memorandum Opinion and Order*, 24 FCC Rcd 3807, n.64 (EB 2009) (parties’ inability to reach an agreement does not indicate failure to negotiate in good faith).

¹⁸ By requiring a licensee to “relinquish its authorization for the unserved *or underserved* Tribal land within the geographic area of its license,” *Notice*, 26 FCC Rcd at 2641 ¶ 55 (emphasis added), and defining those areas as “Tribal lands where there is Wireless Radio Services coverage to not more than 65 percent of the population of the Tribal land area,” *id.* at 2634 ¶ 28, the *Notice* could be read to require divestiture of area that has been built out to cover a majority but not more than 65 percent of the population. Aside from being an arbitrary cutoff, this (continued on next page)

give up spectrum in any areas that they have built out and are serving consistent with the terms of their licenses. A licensee should also be given the opportunity to choose to build out in only part of the unserved Tribal area and divest the remainder.

Third, as with the license priority proposal, the Commission must ensure that Tribal entities receiving spectrum through the divestiture option are required to comply with all applicable service rules, including interference protection standards.

Fourth, the option to initiate a build or divest process should commence “only after” the licensee “has satisfied its final construction requirement for the license.”¹⁹ Initiating the process prior to the licensee’s satisfaction of its construction requirements could undermine network build plans and artificially force construction in certain areas at the expense of others.

Fifth, any such rule “should be prospective only”²⁰ in that it should apply only to future licensees; it cannot lawfully apply to existing licensees that have complied with the performance requirements and other terms and conditions of licenses paid for following auction.²¹ As Verizon Wireless has demonstrated in other contexts, altering the reasonable, investment-backed expectations of a licensee post-auction would raise substantial problems under the Takings

approach carries with it all of the complexities in defining “coverage” discussed above. Any rule should apply only to unserved areas.

¹⁹ *Id.* at 2640 ¶¶ 53-54.

²⁰ *Id.* at 2641 ¶ 55.

²¹ The proposals in the *Notice* would apply to Wireless Radio Services that are licensed on a geographic basis, including PCS, AWS and 700 MHz services which were licensed following auction. *See Notice*, 26 FCC Rcd at 2630-31 ¶ 19. Verizon Wireless agrees that “800 MHz Cellular licenses and other site-based services” should not be subject to these proposals, because they are already “subject to licensing rules that permit third parties to acquire and provide service to unserved areas.” *Id.* at 2631 ¶ 19.

Clause²² and constitute secondary retroactivity,²³ and therefore any build-or-divest rule must apply only to new licenses.

Finally, whether the licensee elects to extend coverage or divest spectrum for the Tribal entity to build out, the performance requirements should be the same for the licensee and the Tribal entity. Those performance requirements should “reasonably result in timely and meaningful service coverage” while acknowledging the “difficulties of deploying facilities in often remote and rural areas.”²⁴ The Commission should not apply to the licensee more excessive build requirements – whether it be coverage or length of time to build – than it imposes on Tribal entities. Otherwise, the Commission could set the standard so high that no licensee would reasonably choose the build option, in which case the “option” is tantamount to a mandatory divestiture requirement. Nor should the Commission permit a Tribal entity to sell or lease all or a portion of spectrum acquired through the divestiture option until it has met its performance requirements.²⁵ Such a requirement is needed to ensure that divested spectrum

²² Imposing a build or divest mandate on existing licensees would effect a regulatory taking by (i) interfering with licensees’ reasonable, investment-backed expectations in acquiring spectrum based on the understanding that their licensed spectrum would remain intact if they met performance, renewal and other license requirements; (ii) exacting a substantial economic effect by forcing licensees to add cell sites and network equipment or divest valuable spectrum without compensation; and (iii) involving government action that is unusual and restricts licensees’ ability to control the uses of the spectrum for which they hold a license. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-24 (1978); Comments of Verizon Wireless, WT Docket No. 05-265, at 42-49 (Jun. 14, 2010); Reply Comments of Verizon Wireless, ET Docket Nos. 10-236 & 06-155, at 12-13 (Apr. 11, 2011).

²³ Applying a build or divest mandate to existing licensees would alter the rights of spectrum they acquired at auction – rights upon which those licensees relied in placing their bids – which would manifest secondary retroactivity. *See Mobile Relay Associates v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (secondary retroactivity “occurs if an agency’s rule affects a regulated entity’s investment made in reliance on the regulatory status quo before the rule’s promulgation”); *U.S. AirWaves, Inc. v. FCC*, 232 F.3d 227, 235 (D.C. Cir. 2000) (“[An] agency cannot, in fairness, radically change the terms of an auction after the fact.”); *Ex Parte* Letter from John T. Scott, III, Vice President & Deputy General Counsel, Regulatory Law, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, at 9-10 (Mar. 30, 2011).

²⁴ Notice, 26 FCC Rcd at 2641 ¶ 56.

²⁵ *See id.* at 2642 ¶¶ 61-62.

cannot be turned around prior to construction, thereby undermining the goal of giving spectrum to qualifying Tribal entities to speed service to Tribal areas and potentially undermining the Commission's secondary markets policies generally.

III. CONCLUSION

For the forgoing reasons, the Commission should give Tribal entities priority access to future releases of spectrum covering unserved Tribal lands, establish a Tribal lands construction safe harbor, and enhance the Tribal lands bidding credit, subject to the limitations discussed above. These three concrete actions will themselves address concerns about enabling Tribal entities to acquire spectrum and deployment of service to Tribal lands. The additional proposals to mandate good faith negotiations and to require construction or divestiture, however, are premature, present a number of concerns, and should be deferred for consideration until after the efficacy of the three incentive programs can be assessed.

Respectfully submitted,

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